IN THE

Supreme Court of the United States

October Term, 1979

No. 79-151

THE PEOPLE OF THE STATE OF NEW YORK,
Petitioner,

vs.

ST. AGATHA HOME FOR CHILDREN, INC., and ROBERT KEATING,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI.

Brief in Opposition
~~MOTION TO DISMISS OR AFFIRM.~~

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MOTION TO DISMISS OR AFFIRM.

Respondents, pursuant to Rule 16 of the revised rules of the Supreme Court of the United States, move that the final judgment of the Court of Appeals of the State of New York be affirmed or, in the affirmative, that this appeal be dismissed.

RELEVANT STATUTORY PROVISIONS.

County Law § 218-a - County detention facilities for juvenile delinquents and persons in need of supervision.

B. Notwithstanding any other provisions of law, each board of supervisors shall provide or assure the availability of conveniently accessible and adequate non-secure detention facilities, certified by the state division for youth, as resources for the family court in the county pursuant to article seven of the Family Court Act, to be operated in compliance with the rules of the State Board of Social Welfare and regulations of the division for youth for the temporary care and maintenance of alleged juvenile delinquents and persons in need of supervision held for or at the direction of a family court.

Social Services Law § 374-e - Authority to enter into leases for dwelling units.

Any inconsistent provisions of this chapter or any other law notwithstanding, a public welfare official authorized to operate agency boarding homes or group homes is hereby empowered to rent or lease dwelling units in his capacity as a public welfare official, as lessee, in any federal project, state project or municipal project, as defined in the public housing law, or in any municipally-aided project or state-aided project, or other project, as defined in the private housing finance law, *or elsewhere*, for the purpose of operating therein such agency boarding homes or group homes, and is hereby empowered to contract, in his capacity as a public welfare official, as contractor, with individuals for their services in conducting

such homes and caring for children or minors placed in such homes. (Emphasis supplied)

QUESTIONS PRESENTED.

1. Is the State Court decision affirming dismissal of the criminal information on the non-Federal ground that the County may initiate, approve, and fund a non-secure detention facility pursuant to State statute, notwithstanding a local zoning ordinance to the contrary, based upon such an adequate State ground as precludes further review?

2. Does a substantial federal question properly exist for review by this Court?

STATEMENT OF THE CASE.

Defendant-respondent St. Agatha Home for Children Inc. (hereinafter respondent St. Agatha) is a child-caring agency among

whose functions is the setting up and operation of group homes, for small groups of children who, for one reason or another, cannot function within their own homes, and who may be placed in group homes as an alternative to institutional placement. Defendant-respondent Robert Keating (hereinafter respondent Keating) is an employee of respondent St. Agatha.

In or about 1976 Westchester County asked child care agencies to submit proposals for a program which the County wished to operate with the accent on de-institutionalizing children and placing them in a community-based program instead. The proposal submitted by St. Agatha was accepted by the County. Pursuant to the proposal and acceptance, St. Agatha personnel then attempted to find a site for a facility which would meet the specifications of the New York State Division for Youth,

New York State Board of Social Welfare and the County of Westchester. The availability of the subject premises was called to the attention of respondent Keating and after investigating the site and finding that it met the requirements of all concerned, he made this information available to the concerned parties and the site was approved.

Respondent Keating discussed the matter with the Community Residents Information Services Program (C.R.I.S.P.), following which he contacted Mr. Zwick, Town Supervisor of the Town of Pound Ridge. Following this conversation, a meeting was arranged for January 12, 1977, among representatives of respondent St. Agatha, Town officials and the community, at which the community was told about the program and given an opportunity to discuss it and ask questions about it.

A two-year lease was entered into between St. Agatha and the landlord, Mr. Volper. The home was then set up as a non-secure detention facility to house a maximum of ten children sent by the Family Court of Westchester County.

By summons dated January 31, 1977, and information dated January 27, 1977, respondents were charged with violation of the zoning ordinances of the Town of Pound Ridge, a criminal offense. (The ordinance is set forth in pertinent part in pp. 35a-39a of the instant Petition)

A trial was held before the Honorable Robert J. Eichelburg, Town Justice, who found respondents St. Agatha and Keating guilty as charged. Following a sentencing hearing, the Town Justice ordered a conditional discharge; among the conditions were no further admissions of children to the facility and removal of the children then in residence.

The matter was duly appealed to the Appellate Term for the Ninth and Tenth Districts of the Second Department and by order dated May 9, 1978, the judgment of conviction was unanimously reversed and the information dismissed.

OPINION BELOW.

The opinion in the Court of Appeals is set forth in full in the Petition, pp. 3a-4a. In brief, it held that the People had failed to meet their burden of proving all the elements of this criminal offense beyond a reasonable doubt. The Court of Appeals went on to hold that the County of Westchester is authorized and indeed required by County law §218-a to provide adequate non-secure detention facilities notwithstanding any conflicting local ordinance and that uncontroverted and unchallenged evidence showed that

the subject premises were established in conformity with that statutory requirement. The Court of Appeals concluded that "the County having determined as it is authorized to do by the statute, to fulfill its obligation through the vehicle of privately operated homes, that decision may not be overruled by application of a local zoning ordinance". (Pet. p. 4a)

Permission to appeal directly to the Court of Appeals was granted to the Town by order of the Honorable Charles D. Breitel, Chief Judge, dated July 11, 1978.

By decision and judgment rendered May 1, 1979, the Court of Appeals affirmed, holding that the county was authorized and indeed required by statute to provide adequate facilities for non-secure detention such as the subject premises, despite any conflicting local ordinance.

This petition followed.

ARGUMENT.

CERTIORARI SHOULD BE DENIED BECAUSE THE STATE COURT JUDGMENT WAS BASED UPON A NON-FEDERAL GROUND ADEQUATE TO SUPPORT SUCH JUDGMENT; FURTHER NO SUBSTANTIAL FEDERAL QUESTION IS PROPERLY PRESENTED SO AS TO REQUIRE FURTHER ARGUMENT HEREIN.

There is no question that the New York State Court of Appeals based its judgment herein upon a non-federal ground, nor does Petitioner claim otherwise. The decision of the State Court affirmed reversal of the judgment of conviction of respondents on the ground that the people failed to prove all of the elements of the offense beyond a reasonable doubt in this criminal proceeding. (Pet. p. 3a) The State Court went on to find that the facility in question had been initiated, approved, and funded by the County and that the County had thereby determined, as authorized by statute (County law §218a) to fulfill its obligation to provide or assure the availability of conveniently accessible and adequate

non-secure detention facilities through the vehicle of privately operated homes, such as the premises at issue, and "that decision may not be overruled by application of a local zoning ordinance". (Pet. p. 4a)

This clearly represents such an adequate State ground as would preclude further review by this Court. *Minnesota v. Andrews*, 419, U. S. 881 (1973), *Board of Supervisors of Fairfax County v. Allman*, 423 U. S. 940 (1975).

Petitioner has relied principally upon *Moore v. City of East Cleveland*, 431 U. S. 494 (1977) and *Village of Belle Tere v. Boraas*, 416 U. S. 1, (1974) in support of its contention that the local zoning ordinance is constitutional. However, the Court of Appeals did not find it necessary to reach this ground; thus, these cases are irrelevant here. In *Boraas* this Court held that occupancy restrictions based upon biological family ties do not violate

federal first amendment rights. *Moore v. City of East Cleveland* held that an ordinance which limited occupancy of a dwelling unit to members of a single family, and limited such families to a few categories of related individuals was constitutionally invalid. Surely neither case requires that the State Court ignore state statutes and allow local zoning laws to frustrate the intent of the legislature as it would here, where the legislature has expressly directed the County to provide for such non-secure detention facilities as the subject premises. [It is interesting to note that while petitioner in this Court argues against the "County of Westchester. . . ignor[ing] a local zoning ordinance", (Pet. p. 9), the only Court which upheld petitioner, the local Town Court, did so solely on the ground that the County could in fact override such ordinance stating: "Again the only governmental

body that has the legislatively granted power to be exempt from local zoning ordinances in matters such as the establishment of non-secure detention facilities remains with the County of Westchester under the County Law, Section 218-a-B". (Pet. p. 24a)]

Thus the non-federal ground upon which the State Court decision was based was surely adequate to support such decision. Nor is there any claim here that the Court below reached its decision in order to evade the constitutional issue. A case closely analogous to our case is *Fox River Paper Company v. Railroad Commission*, 274 U. S. 651 (1927). There this Court affirmed a State Court ruling that rights of riparian owners are subordinate to State control of navigable waters, finding that it did not appear that the State Court holding ran counter to any established rule of property of the State, nor was

there such conflict of authority or inconsistency of judicial opinion as even to suggest that the State Court had reached its decision to evade the constitutional issue (*id.* at 656).

The fact that the non-federal ground is adequate to support the judgment is in and of itself sufficient ground for the granting of this motion. However, in addition, this appeal does not present a substantial federal question as to give this Court jurisdiction over the proceedings. *Palmer Oil Corp. v. Amerada Corp.*, 343 U. S. 390 (1952)

Jurisdiction has been invoked by petitioner "under the provisions of 28 U.S.C.A. Section 1256 (3)". (Pet. p. 2) Obviously no such jurisdiction attaches here, as that section deals with Court of Custom and Patent appeals.

Even assuming *arguendo* that petitioner meant to invoke jurisdiction under 28

U.S.C.A. Section 1257 (3), such jurisdiction does not lie here. It is a *sine qua non* of such jurisdiction that the substantial federal question sought to be reviewed must have been raised not only at the outset of the proceedings but at every stage thereof. Indeed Rules 15(1)(d) and 23(1)(f) of the Rules of this Court require petitioner to "specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them . . . and the way in which they were passed upon by the Court; . . . as will show that the Federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on writ of certorari." [Rule 23 (1)(f)].

Petitioner's mere statement that "The defendants on motion and in their briefs

in all of the courts espoused the doctrine that the Town ordinance was unconstitutional . . ." and that "the People maintained and argued throughout all of the proceedings that the zoning ordinance was valid and constitutional . . ." (Pet. p. 7) hardly satisfies the aforementioned rules. It is clear, of course, that briefs and oral argument are not ordinarily part of any record filed in the Supreme Court and cannot be used to estabish that a Federal question was raised. *Live Oak Association v. Railroad Commission*, 269 U. S. 354 (1925); *Lynch v. NY ex rel. Pierson*, 293 U. S. 52, 54 (1934). Lacking a substantial Federal question properly framed and raised, this petition must be dismissed. *Street v. New York*, 394 U. S. 576, 582 (1969).

The issue as framed in the Court of Appeals was whether petitioner had met its burden of proving all of the elements

in a criminal proceeding beyond a reasonable doubt. In determining that petitioner had not, it found no necessity to "reach [respondent's] other contentions." (Pet. p. 4a) Thus there is surely no substantial Federal question for review here.

CONCLUSION.

The judgment of the New York State Court of Appeals should be affirmed or the appeal dismissed.

DATED: Sept. 17, 1979.

Yours, etc.,

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